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Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse

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Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?

Most Americans share the conviction that no wrong should go unpunished and that every victim should have his "day in court." Whether based on the wish to maintain the status quo or the basic human desire for revenge,[1] the American system of legal redress focuses on two theories of personal accountability: restitution[2] and retribution.[3] Although these theories are prevalent throughout American law, they have found no place in the laws governing diplomats.[4] Indeed, the doctrine of diplomatic immunity represents "an extraordinary departure from the conventional practice of holding individuals accountable for their wrongful actions."[5]

The doctrine of diplomatic immunity embodies two principles. It protects the personal inviolability of the diplomat[6] and prohibits a diplomat from being subjected to the administrative, civil, or criminal jurisdiction of the receiving state.[7]

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1. "The penalty is . . . not just a means of crime prevention but a merited response to the actor's deed, 'rectifying the balance' in the Kantian sense and expressing moral reprobation of the actor for the wrong." A. VON HIRSCH, DOING JUSTICE 51 (1976).

2. Restitution is used here not in its meaning in the law of contracts, but in its common meaning, e.g.: "[t]he act . . . of compensating for loss, damage, or injury." THE AMERICAN HERITAGE DICTIONARY 1054 (5th college ed. 1982).

3. Retribution is the oldest theory of punishment, and the one which still commands considerable respect from the general public. By this theory, also called revenge or retaliation, punishment (the infliction of suffering) is imposed by society on criminals in order to obtain revenge, or perhaps (under the less emotional concept of retribution) because it is only fitting and just that one who has caused harm to others should himself suffer for it.

W. LAFAVE & A. SCOTT, CRIMINAL LAW 25-26 (2d ed. 1986) (footnote omitted).

4. The theories of restitution and retribution similarly have not influenced the laws governing the extension of immunity to consuls and international organizations as well. This Note, however, will focus exclusively on the law of diplomatic immunity.

5. Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 667 (1980).

6. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 353 (1979).

7. *See* W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 710 (1971); W. HALL, A TREATISE ON INTERNATIONAL LAW 223 (8th ed. 1934). One commentator has astutely noted that diplomatic immunity prevents the receiving state from exercising enforcement jurisdiction (the state's "power to enforce laws and regulations through legal action"), while leaving intact the receiving state's prescriptive jurisdictional powers (the state's "power to prescribe rules of conduct for those within its territory"). As that author indicates, such a distinction is vital since prescriptive jurisdiction would enable the receiving state to prosecute

One of the most ancient[8] doctrines of international law,[9] diplomatic immunity was universally acknowledged and implemented long before its codification in the United States in 1790.[10] Not until 1961, however, in the Vienna Convention on Diplomatic Relations,[11] did most nations of the world formally recognize and codify the doctrine.[12]

Several justifications for the doctrine's existence have been posited. They include: the exterritoriality theory, the representational theory, the reciprocity theory, and the functional necessity theory. This Note will briefly discuss each of these theories, paying special attention to the one most universally accepted,[13] functional necessity, which serves as the basis for the Vienna Convention and its complement[14] in the United States, the Diplomatic Relations Act of 1978.[15] Although based on distinctly different premises, each of these theories recognizes the necessity for diplomatic immunity in the conduct of foreign affairs. As one scholar writes:

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an offender if his diplomatic status is terminated, permitting the exercise of enforcement jurisdiction. In addition, prescriptive jurisdiction provides the basis for an action against the offending diplomat in his sending state. Comment, *supra* note 5, at 662; *see also* Empoon v. Smith, 1 Q.B. 426, 438, 41 I.L.R. 407, 412 (1966).

8. "Since the beginning of government the inviolability of ambassadors and ministers has been universally recognized in all civilized countries." 81 CONG. REC. 8987 (1937) (statement of Sen. Pittman). "The more fundamental rules of diplomatic law—that the person of the ambassador is inviolable and that a special protection must be given to the messages which he sends and receives from his sovereign—have existed from time immemorial among civilised [sic] states." E. SATOW, SATOW'S GUIDE TO DIPLOMATIC PRACTICE 106 (Lord Gore-Booth 5th ed. 1979); *see also* Griffin, *Diplomatic Immunity*, 13 STUDENT LAWYER 18, 20 (1984) (dating the existence of diplomatic inviolability to before the early Roman Empire).

9. Blackstone regarded "infringement of the rights of ambassadors" as one of "the principal offences against the law of nations." 4 W. BLACKSTONE, COMMENTARIES *68; *see also* 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1249 (1945) (doctrine of diplomatic immunity "solidly entrenched in the law of nations"); Comment, *supra* note 5, at 662.

10. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 117-18 (repealed 1978) [hereinafter Act of Apr. 30, 1790].

11. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

12. The Vienna Convention is the first comprehensive, truly international convention on diplomatic immunities. An earlier convention relation to privileges and immunities was signed at the Sixth International Conference of American States, Havana, Cuba in 1928, but only American States were represented. The Congress of Vienna in 1815 formulated international law on diplomatic immunity, but only as it pertained to heads of mission. The document was signed by only eight European Powers.

Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67, 69 (1966).

13. C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 20-21 (1967).

14. *See* S. REP. NO. 958, 95th Cong., 2d Sess. 1 (1978).

15. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254(a)-(e), 28 U.S.C. § 1364 (Supp. II 1978) [hereinafter Diplomatic Relations Act].

> Diplomatic immunities are required on the ground of practical necessity. . . . It is in the interest of the State accrediting the diplomatic agent, and in the long run in the interest also of the State to which he is accredited, that he should have such liberty as will enable him, at all times and in all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates.[16]

Despite the indispensability of diplomatic immunity in international relations,[17] the doctrine has proved to be an extremely costly American foreign policy practice for those Americans residing in cities where diplomats are stationed. Diplomats, aware that they cannot be sued or prosecuted for their unlawful acts, violate local laws. From parking violations to drug smuggling, rape, and murder, diplomats exploit their special status. More important, they are not punished and the victims of diplomatic immunity abuse are not compensated for their losses. The possibility of imposing criminal sanctions against those who abuse their grant of diplomatic immunity is beyond the scope of this Note. Instead, it will focus on civil compensation for individuals harmed by diplomats.

The prevalence of diplomatic immunity abuse, primarily in New York, Maryland, Virginia, and Washington, D.C.,[18] has become the subject of much concern. Growing resentment by both the victims of diplomats and the public has prompted a re-examination of the doctrine of diplomatic immunity. In an effort to hold diplomats more accountable for their actions and to compensate victims for their losses, legislators, legal scholars, and the public have advanced several proposals to curtail diplomatic immunity. Much of this discussion, however, has been purely academic, and the abuses continue.

In light of the judiciary's recent definitional expansion of taking under the Fifth Amendment,[19] Americans who have fallen victim to diplomatic abuses may now have a constitutional right to "just compensation."[20] This Note focuses not only on the moral imperative for change, but the possible constitutional mandate for it.

Part I of this Note discusses the background of diplomatic immunity, including its history, rationales, and enabling legislation, in particular the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act. Part II examines the abuses of diplomatic immunity and

16. W. HALL, *supra* note 7, at §§ 218-19.

17. Note, *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 LOY. L.A. INT'L & COMP. L.J. 113, 113 (1984).

18. One journalist living in Maryland, one of the states where diplomatic abuses frequently occur, comments that "abuse of the privilege is an all-too common fact of life." Turan, *The Devilish Demands of Diplomatic Immunity*, Washington Post, Aug. 22, 1976, at 20, col. 1.

19. U.S. CONST. amend. V.

20. U.S. CONST. amend. V.

some of the reasons for these abuses. Part III explores the constitutionality of noncompensation for victims of diplomatic immunity abuse, paying particular attention to the compelling governmental and individual interests involved. Part IV discusses the growing need for reform in light of the possible unconstitutionality of current diplomatic immunity practices. A number of propositions by legislators and scholars to alter diplomatic immunity are also briefly critiqued. Finally, Part V advances a new solution to the problem: a right of action against the United States Government in the Court of Claims.[21] This proposal enjoys the advantage of leaving the diplomatic immunity doctrine intact while levying its costs on the American public rather than on a few individuals.

I. Diplomatic Immunity: History, Rationales, and Codification

A. The History of Diplomatic Immunity

The existence of and recognized necessity for diplomatic immunity date back several thousand years.[22] Legal scholars agree that "many of the fundamental principles of diplomatic law as they exist today were already in practice more than 2,000 years ago."[23] During the Renaissance, diplomatic immunity evolved into its present form.[24] In Venice, Italy, the first embassies were created and nations began receiving diplomats on a permanent basis.[25] With this growth in diplomatic exchange came the concomitant need for diplomatic immunity.[26]

During the sixteenth and seventeenth centuries a great number of treatises on international relations, many dealing specifically with diplomatic immunity, were written throughout Europe.[27] Among them was Grotius' *De Jure Belli ac Pacis* (*The Law of War and Peace*), probably the most influential work on international law to date. In this book, Gro-

21. *See infra* notes 267-280 and accompanying text.

22. Griffin, *supra* note 8, at 20.

23. LIBRARY OF CONGRESS, HISTORY OF THE CONCEPT OF DIPLOMATIC IMMUNITY (1979), *reprinted in* SENATE COMMITTEE ON FOREIGN RELATIONS, REPORT ON LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, 96TH CONG., 1ST SESS., 13 (Comm. Print 1979) [hereinafter LEGISLATIVE HISTORY]. *See also* Preamble to Vienna Convention, *supra* note 11 ("peoples of all nations from ancient times have recognized the status of diplomatic agents"). Historians have traced the doctrine of diplomatic immunity back as far as the 13th century B.C. to a treaty of peace and alliance between the Hittites and Egypt's Rameses II. *See* E. PLISCHKE, CONDUCT OF AMERICAN DIPLOMACY 3 (3d ed. 1967). Thereafter, in ancient Greece and Rome, it was universally accepted that ambassadors and attachés could not be subjected to either civil suits or criminal prosecution in the receiving state, nor could their correspondence be examined. *See generally* G. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 115-16 (2d ed. 1952).

24. LEGISLATIVE HISTORY, *supra* note 23, at 13-14.

25. *Id.* at 14.

26. *Id.*

27. Young, *The Development of the Law of Diplomatic Relations*, 40 BRIT. Y.B. INT'L L. 141, 147 (1964).

tius, a diplomat himself,[28] declared, "There are two maxims in the law of nations relating to ambassadors which are generally accepted as established rules: The first is that ambassadors must be received and the second that they must suffer no harm."[29] Not surprisingly, diplomatic immunity, in some form or another, had become customary international law by the early 1700s.

In 1708, England passed the Diplomatic Privileges Act,[30] "[g]rant[ing] virtually complete immunity from both criminal prosecution and civil suit to diplomatic 'agents,' their families,[31] their staffs, and their personal servants."[32] By 1784, this liberal extension of diplomatic immunity had made its way across the Atlantic. In that year, the earliest diplomatic immunity case in the United States,[33] *Respublica v. De Longchamps*,[34] was decided. This case, adopting the rule of virtually absolute immunity, became the basis for the first statutory enunciation on diplomatic immunity in the United States six years later.

Promulgated by the First Congress, the diplomatic immunity statute of 1790 protected "any ambassador or other public minister of any foreign prince or state authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister"[35] from arrest or imprisonment, and from seizure or attachment of his goods or property. In addition, the statute made it a crime, punishable by a fine and a three year sentence, just to bring suit against a diplomat.

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28. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 11 (9th ed. 1984).

29. B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 6-7 (1988) (citing H. GROTIUS, DE JURE BELLI AC PACIS, Bk. II, Ch. XVIII (1625)).

30. 7 Anne, ch. XII. The result of an international incident, the Diplomatic Privileges Act boasts a colorful history. In 1708, Peter the Great's Ambassador to England was arrested for an overdue debt. Outraged at the indignation, the Czar demanded that the arresting officers be executed. In response to this and other similar incidents, Parliament passed the Act. Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1519 n.9 (1986).

31. England's Diplomatic Privileges Act defines "family" more broadly than does the Vienna Convention. Under England's Act, the family includes persons related by blood or marriage and those living with the embassy employee in a de facto family relationship. Samuels, *Diplomatic Privileges Act, 1964*, 27 MOD. L. REV. 689, 691 (1964).

32. C. ASHMAN & P. TRESCOTT, DIPLOMATIC CRIME 67 (1987).

33. Comment, *supra* note 5, at 664-65.

34. 1 U.S. (1 Dall.) 111 (1784). In *De Longchamps*, the Oyer and Terminer Court of Pennsylvania found Charles Julian De Longchamps "guilty of an attrocious [sic] violation of the law of nations," *id.* at 117, after he had "struck the cane of Monsieur Marbois," *id.* at 111. Although the French Minister Plenipotentary, Marbois, "as soon as the stroke was given, . . . employed his stick with great severity," *id.* at 112, the jury found De Longchamps guilty of both assault and battery and the court sentenced him to pay a fine of one hundred French Crowns and to serve a two year prison term. *Id.* at 118.

35. Act of Apr. 30, 1790, *supra* note 10, at 118.

"From its enactment in 1790 to its repeal in 1978 with the passage of the Diplomatic Relations Act, this statute was the sole basis for diplomatic privileges and immunities in the United States."[36] Even after ratification of the more restrictive Vienna Convention on Diplomatic Relations in 1972, the United States Department of Justice, invoking Article 47(2)[37] of the Vienna Convention, which allows states to reciprocally extend more favorable treatment than provided under the Convention, continued to grant virtually absolute immunity to foreign diplomats.[38] This action by the United States government also enabled American diplomats to enjoy greater immunities. Subpart I(C) of this Note further discusses both the Vienna Convention and the Diplomatic Relations Act.

B. Rationales for Diplomatic Immunity

According to the frequently cited March 16, 1906, letter of then Secretary of State Elihu Root:

> There are many and various reasons why diplomatic agents, whether accredited or not to the United States, should be exempt from the operation of the . . . law at [sic] this country. The first and fundamental reason is the fact that diplomatic agents are universally exempt by well recognized usage incorporated into the Common law of nations, and this nation, bound as it is to observe International Law . . . cannot, if it would, vary a law common to all.[39]

Among the other theories advanced to justify diplomatic immunity, the following have gained the greatest acceptance: the representational theory, the exterritoriality theory, the reciprocity theory, and the functional necessity theory. Although works on diplomatic immunity traditionally do not examine the reciprocity theory as a distinct theory, it is worthy of independent examination and should not be subsumed by the other theories.

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36. Note, *supra* note 17, at 119; *accord* Note, *Diplomatic Privileges and Immunities—The Diplomatic Relations Act of 1978: A Congressional Response to a Vexing Problem*, 22 HOW. L.J. 119, 121 (1979).

37. The Vienna Convention provides:

> 1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States. 2. However, discrimination shall not be regarded as taking place: (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State; (b) *where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.*

Vienna Convention, *supra* note 11, art. 47 (emphasis added).

38. S. REP. NO. 958, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1935, 1936.

39. G. HACKWORTH, IV DIGEST OF INTERNATIONAL LAW 513 (1942).

1. The Representational Theory

The oldest of the four theories,[40] the representational theory, was first advanced in the United States in 1784.[41] Based on the concept of the ambassador as the sovereign's *locum tenens*,[42] this theory is best described in *The Schooner Exchange v. M'Faddon*,[43] decided in 1812. According to the Court, "[t]he assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad."[44]

Over time, support for the representational theory has diminished for three reasons. First, modern political reality contradicts and undermines the theory's very premise.[45] Second, as Professor Reiff indicates, because it places both the sovereign and his representative above the laws of the receiving state, "the theory is altogether too wide and fallacious for the business of conducting international business."[46] Moreover, on a purely *realpolitik*[47] level, it is difficult to reconcile placing the representative of the sending state above the laws of the receiving state with the sovereignty of the receiving state.[48] Finally, as Professor Preuss points out, while the theory sufficiently justifies granting immunity for the official acts of a representative, it fails to justify advancing immunity to a representative for private acts.[49]

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40. According to scholars, the representational theory "predates the Renaissance emergence of the various theories and is found among the so-called civilized ancients, . . . who developed the concept that the ambassador enjoyed personal inviolability because he was the 'mouthpiece' of his sovereign." C. WILSON, *supra* note 13, at 1-2 (citing F. RUSSELL, THEORIES OF INTERNATIONAL RELATIONS 42 (1936)).

41. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784). "The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." *Id.* at 116.

42. "A deputy, substitute, . . . or representative." BLACK'S LAW DICTIONARY 848 (5th ed. 1979).

43. 11 U.S. (7 Cranch) 116 (1812).

44. *Id.* at 138-39.

45. In a world composed of non-monarchical powers, it is difficult to identify the "sovereign" to whom a diplomat owes his allegiance and through whom a diplomat claims his entitlement to immunity. This is well illustrated by a "popular sovereignty" nation such as the United States. Note, *supra* note 17, at 115; *see also* C. WILSON, *supra* note 13, at 4.

46. H. REIFF, DIPLOMATIC AND CONSULAR PRIVILEGES, IMMUNITIES, AND PRACTICE 26 (1954).

47. This term comes from the Greek *real* or practical and *politik* or politics. It is defined as "[a] usually expansionist national policy having as its sole principle the advancement of the national interest." THE AMERICAN HERITAGE DICTIONARY 1031 (2d college ed. 1982).

48. *See* H. REIFF, *supra* note 46.

49. C. WILSON, *supra* note 13, at 4 (discussing Preuss, *Capacity for Legation and the Theoretical Basis of Diplomatic Immunity*, 10 N.Y.U. L.Q. REV. 170, 179-81 (1933)).

Despite the representational theory's declining popularity,[50] it continues, albeit infrequently, to serve as a rationale for granting diplomatic immunity. For instance, in 1946, a federal court in New York, granting a defendant-diplomat immunity from service of process, held that "a foreign minister is immune from the jurisdiction, both criminal and civil, of the courts in the country to which he is accredited on the grounds that he is the representative, the alter ego, of his sovereign who is, of course, entitled to such immunity."[51] Thus, although diminished in significance, the representational theory nevertheless continues to be implemented.

2. The Exterritoriality Theory

According to the exterritoriality theory, the diplomat, while performing his duties in the receiving state, remains in the sending state for jurisdictional purposes. As the New York Supreme Court stated in *Wilson v. Blanco,*[52] the doctrine of diplomatic immunity "derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he, in contemplation of law, always abides."[53]

While some critics of the exterritoriality theory consider it a "dangerous fiction,"[54] others continue to appreciate its practical significance. According to one supporter, Lassa Oppenheim:

> Exterritoriality . . . is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term "exterritoriality" is nevertheless valuable, because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States.[55]

Despite Oppenheim's recognition of its pragmatism, the exterritoriality theory, like the representational theory, has fallen into relative disfavor.[56] The many reasons for the theory's demise include: (1)

50. C. WILSON, *supra* note 13, at 4; Note, *supra* note 30, at 1520.

51. Bergman v. De Sieyes, 71 F. Supp. 334, 341 (S.D.N.Y. 1946).

52. 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 714 (1889).

53. *Id.* at 583, 4 N.Y.S. at 714.

54. C. WILSON, *supra* note 13, at 7 (quoting E. ADAIR, THE EXTRATERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 260-64 (1929)).

55. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 793 (8th ed. 1955).

56. Montell Ogdon in his definitive work on diplomatic immunity states that the "recent and current trend is conclusively in favor of repudiating the exterritorial concept in every form"; [Charles Cheney] Hyde refers to a "complete abandonment" of the theory; [Ellery] Stowell calls it a "wornout fiction"; [Clyde] Eagleton declares that the "idea of exterritoriality . . . has been abandoned"; and J.C. Gregory claims the theory is "outmoded and, logically, no longer applicable."

C. WILSON, *supra* note 13, at 9 (footnotes omitted); *see also* Preuss, *supra* note 49, at 183 (The exterritoriality theory "is no longer considered to be a legal principle or an explanation of diplomatic immunities.").

inconsistencies in the use of the term,[57] which in turn create problems in determining the scope of its application;[58] (2) overextension of immunities and privileges to all diplomats regardless of rank;[59] and (3) the mistaken assumption that "diplomatic immunity is based upon the absolute *independence* of nations when, in fact, the question of immunity arises only because nations are *interdependent* in the area of international relations."[60] As a result, the theory is infrequently invoked today to justify granting diplomatic immunity.

3. *The Reciprocity Theory*

"In general, nations faithfully adhere to the law of immunities, primarily because of the rule of reciprocity, or, restated less diplomatically, primarily because of the fear of retaliation."[61] While not officially recognized as a separate justification for diplomatic immunity, there is no doubt that "[n]ations agree on diplomatic immunity because it is reciprocal. No country wants its envoys subject to a foreign legal system."[62] Therefore, out of practical necessity,[63] each state is willing to extend immunity because its own diplomats will be extended immunity in return.

This theory could be called the "golden rule" of international relations: Countries should treat the diplomats of other countries as they would want their own diplomats to be treated. Indeed, as the Court of Appeals for the District of Columbia recently stated, "The degree of pro-

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57. It has been called both the *ex*territoriality theory and the *extra*territoriality theory. Most agree that the former is the proper usage.

> Exterritoriality is defined as the privilege of those persons such as foreign ministers, who though temporary residents in a country, are not subject to its laws. *Ex*territoriality should not be confused with *extra*territoriality, which is the operation of laws upon persons, rights, or jural relations existing beyond the limits of the acting state or nation but still amenable to the operation of that State's laws.

See Note, *supra* note 30, at 1520 n.20 (emphasis in original) (citation omitted). *See also* C. WILSON, *supra* note 13, at 11-12.

58. Note, *supra* note 17, at 117 (citing M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY 102-03 (1936)).

59. *Id.* (citing D. MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES 49 n.63 (1971)).

60. *Id.* (citing Note, *Terrorist Kidnapping of Diplomatic Personnel*, 5 CORNELL INT'L L.J. 189, 198 (1972) (emphasis in original)).

61. C. WILSON, *supra* note 13, at 26.

62. Griffin, *supra* note 8, at 18-20; *see also* E. SATOW, *supra* note 8, at 175 ("These immunities are founded on common usage and tacit consent; they are essential to the conduct of the relations between sovereign states; they are given on the understanding that they will be reciprocally accorded."); E. DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 2 (1976) ("[A]t all times the real sanction of diplomatic law is reciprocity. Every State is both a sending and a receiving State. Its own representatives abroad are hostages and even on minor matters their treatment will depend on what the sending State itself accords.").

63. Practical necessity should not be confused with functional necessity, which will be discussed *infra*.

tection afforded by foreign governments to American diplomatic personnel abroad depends in significant part upon the protection provided by our government to foreign diplomats living in Washington, D.C."[64] Under this theory, a nation may rely, to some extent, on the good will of other countries to reciprocate when it extends diplomatic immunity, because each member of the international community has something to gain by extending immunity. More important, each has something to lose if it has diplomats stationed in foreign nations and does not extend this immunity.

The reciprocity theory, like the other theories discussed thus far, is not without its problems. For example,

> the proper national posture is not always easy to determine, or to maintain, because of a lack of consensus on some of the basic general rules. This situation is further complicated by the problem of determining the categories of diplomats, quasi-diplomats, and non-diplomats—all claiming at least a degree of rights and immunities—who have been dispatched in great numbers throughout the international community.[65]

Furthermore, just as reciprocity may facilitate the extension of diplomatic immunity, it may also impede its withdrawal. Once one country alters or curtails the immunity it grants foreign dignitaries, other members of the international community are likely to follow suit.

4. The Functional Necessity Theory

Under the functional necessity theory, diplomats are granted immunity "to ensure the efficient performance of the functions of diplomatic missions."[66] To hold a diplomat subject to suit would invite harassment, interfere with the diplomatic agenda and thereby hinder international relations. As one State Department official commented: "If every Tom, Dick and Harry [could] be haled into court because his dog is barking too long, he wouldn't be able to get his work done. And it's not really his work, it's the work of his state."[67] Unfortunately, many diplomats fail to remember that under the functional necessity doctrine, "it is the *work*

64. Finzer v. Barry, 798 F.2d 1450, 1453 (D.C. Cir. 1986).

65. C. WILSON, *supra* note 13, at 26.

66. Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 980 (D.C. Cir. 1965) (quoting Vienna Convention, *supra* note 11, preamble). In accordance with the functional necessity theory, in 1935 Secretary of State Cordell Hull stated that diplomatic immunity is extended "to allow governments to transact official business free from interruption which might flow from molestation of or interference with representatives." Preuss, *Protection of Foreign Diplomatic and Consular Premises Against Picketing*, 11 AM. J. INT'L L. 705, 708 (Oct. 1937) (quoting letter from Secretary Hull to Secretary Pittman (Aug. 3, 1937)).

67. *Diplomatic Immunity: Hearings Before the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 129 (1978) (statement of Hampton Davis, Assistant Chief of Protocol for Diplomatic and Consular Liaison, Department of State).

rather than the official which is protected . . . ."[68] This subject will be discussed more fully under diplomatic immunity abuses in Part II.

The functional necessity theory is currently the most widely accepted justification for diplomatic immunity.[69] It is the theory adopted by the drafters of both the Vienna Convention and the Diplomatic Relations Act. In addition, it forms the basis for all other modern codifications of diplomatic relations.[70]

The popularity of the functional necessity theory is attributable, in large part, to its flexibility and pragmatism. While it provides for "the unhindered performance of essential diplomatic duties," it also "provide[s the] justification for restrictions on diplomats' immunity if those restrictions do not affect the functioning of the diplomat as a diplomat."[71] Therefore, it theoretically grants immunity only when it is needed to promote international relations.

The functional necessity theory has not, however, escaped criticism. It has been attacked both for its vagueness and for its negative implications. Its vagueness stems from its failure to define those acts which are essential to diplomatic functioning and those which are subject to restriction. It creates negative implications because "to hold that diplomats require immunity to function effectively implies that diplomats regularly engage in activities that are injurious or illegal."[72] Despite these drawbacks, the functional necessity theory remains the predominant justification for granting diplomatic immunity.

C. Codification: The Vienna Convention and the Diplomatic Relations Act

The doctrine of diplomatic immunity was an established axiom of customary international law long before its codification in the Vienna Convention on April 16, 1961.[73] Nevertheless, prior to this time, there had been no clear consensus regarding diplomatic law and practice. While most nations had historically granted absolute immunity, by the late 1950s the world community generally agreed that this blanket grant

68. Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91, 129 (1976) (emphasis added).

69. "Notwithstanding surviving echoes of extraterritoriality and representation in twentieth century enunciations of diplomatic immunity, the doctrine today is more often premised on functional necessity." Note, *The Diplomatic Relations Act of 1978 and Its Consequences*, 19 VA. J. INT'L L. 131, 132 (1978) (footnote omitted).

70. C. WILSON, *supra* note 13, at 17.

71. Note, *supra* note 30, at 1522.

72. Note, *supra* note 17, at 118 (citing Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 670 (1980)).

73. Note, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 177 (1987).

of immunity was inappropriate.[74] In addition, "inconsistencies of state practice, including those relating to the scope of immunities and the persons to whom they apply,"[75] needed to be addressed.

In the Spring of 1961, eighty-one nations met in Vienna, Austria, at a United Nations-sponsored convention to draft a new international treaty on diplomatic relations. Of the fifty-three articles agreed to at the Convention, twelve dealt directly with the subject of immunity.[76] In drafting these articles, the Convention " 'examined [them] in the light of modern conditions, surveying the body of law and practice which had developed over the years regarding the rights, duties, and privileges of diplomatic missions' and 'recogniz[ing] the great need for an agreed international standard of treatment.' "[77] The culmination of this effort, the Vienna Convention, "established the high water mark in the area of international diplomatic law."[78]

Signed on April 18, 1961, the Vienna Convention entered into force of law in the United States on December 13, 1972. At present, 152 nations are parties to the convention.[79] Because the Convention is the codification of customary international law, however, most of its provisions are binding even on nonsignatories.[80] Therefore, even a repeal of the Convention could not abrogate American international obligations under it.

As is evident from the preamble and a number of the provisions of the Vienna Convention, the Convention embraces the functional necessity theory of diplomatic immunity.[81] The preamble to the Convention states that diplomatic privileges and immunities are granted (1) "[to maintain] international peace and security," (2) to "contribute to the development of friendly relations among nations," and (3) "*not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions* as representing States."[82]

Pursuant to Articles 31 and 37, which describe the scope of immunity granted to members of the diplomatic, administrative, technical, and service staffs as well as their families and private servants, varying degrees of immunity are granted based upon the rank and function of each

74. Note, *supra* note 17, at 121 (citing S. REP. No. 958, 95th Cong. 2d Sess. 3 (1978)).

75. Note, *Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal*, 4 FORDHAM INT'L L.J. 135, 142 n.35 (1980).

76. Vienna Convention, *supra* note 11, arts. 29-40.

77. Finzer v. Barry, 798 F.2d 1450, 1458 (D.C. Cir. 1986) (quoting *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 2 (1965)).

78. Note, *supra* note 36, at 121.

79. U.S. State Dept., Treaties in Force 297-98 (1989).

80. United States v. Enger, 472 F. Supp. 490, 505 (D.N.J. 1978); *see also* LEGISLATIVE HISTORY, *supra* note 23, at 15.

81. Young, *supra* note 27, at 164.

82. Vienna Convention, *supra* note 11, preamble (emphasis added).

in the mission.[83] Under this functional approach, all mission personnel, except the highest-ranking "diplomatic agents,"[84] are granted civil, criminal, and administrative immunity only for those acts performed within the scope of their official duties.[85] As a result, the grant of privileges and immunities to diplomats is granted only to the extent necessary to enable a mission to perform its representative functions in the receiving state.[86]

Although some consider the Vienna Convention the "most successful product so far of the United Nations' legislative process,"[87] it has encountered difficulties. As discussed above,[88] with the ratification of the Vienna Convention in 1972, two sets of diplomatic law existed in America: the Vienna Convention and the 1790 Act. On the one hand, the Vienna Convention represented an effort to curtail diplomatic immunity, extending immunity only where it furthered diplomatic functioning. On the other hand, the 1790 Act granted virtually absolute diplomatic immunity. As expected, this dual system created significant inconsistencies in diplomatic practice.[89]

Another related problem involved the Vienna Convention's inadequate system of recourse. While the Convention extended to diplomats the greater immunities available under the 1790 statute, "United States citizens injured by diplomatic tortfeasors were left without compensation or a means of redress for their injuries."[90] The abuses by diplomats are discussed more fully in Part II.[91]

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83. Vienna Convention, *supra* note 11, arts. 31, 37.

84. Vienna Convention, *supra* note 11, art. 1(e). Under this provision, the Convention defines a "diplomatic agent" as "the head of the mission or a member of the diplomatic staff of the mission."

85. Vienna Convention, *supra* note 11, art. 37; *see generally* Note, *supra* note 73, at 190-93.

86. Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67, 70 (1966). Article 3(1) of the Convention sets forth the recognized legitimate functions of a diplomatic mission as follows: (a) representing the sending state in the receiving state; (b) protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law; (c) negotiating with the government of the receiving state; (d) ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state; and (e) promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations. Vienna Convention, *supra* note 11, art. 3(1). *See also* Comment, *supra* note 5, at 682:

> Read in the light of the Convention's reference to the theory of functional necessity, this listing of the mission's functions seems to indicate that diplomatic immunity should be extended only where the work of the mission as a whole would be disrupted, and not simply where the actions of a particular mission member would be restricted . . . .

87. E. DENZA, *supra* note 62, at 1.

88. *See supra* notes 36-38 and accompanying text.

89. Note, *The Effect of the Diplomatic Relations Act*, 31 CAL. W. INT'L L.J. 354, 356 (1981).

90. *Id.* at 357.

91. *See infra* notes 97-112 and accompanying text.

Also adopting the functional necessity theory, the Diplomatic Relations Act[92] was promulgated to eradicate inconsistencies in the law of diplomatic immunity[93] and to correct diplomatic immunity abuses.[94] The specific aims of the Act are to

> (1) codify the privileges and immunities of the Vienna Convention as the sole United States law on the subject; (2) repeal existing federal legislation which is inconsistent with the Vienna Convention; (3) require foreign diplomats in the United States to carry liability insurance against risks arising from the operation in the United States of automobiles, vessels, or aircraft, at a level to be established by the executive; (4) create, as a matter of federal law, a substantive right of an injured or damaged party to proceed directly against the insurance company; [and] (5) make certain conforming amendments to the Judiciary Code.[95]

The Diplomatic Relations Act, like the Vienna Convention, theoretically extends immunity only where necessary for the performance of diplomatic functioning. In practice, however, the Act has proved nearly as ineffectual as the Vienna Convention in confining immunity. Overall, "the Act has not lived up to its supporters' expectations because of poor organization, lack of co-operation from the diplomats themselves, and inadequate enforcement mechanisms."[96]

II. Abuses of Diplomatic Immunity

A. Abuses[97]

Under the Vienna Convention, diplomats, their staffs, and their families must "respect the laws and regulations of the receiving State."[98] Nevertheless, members of diplomatic missions have on numerous occasions violated the civil and penal laws of receiving states, without considering the even greater number of such incidents that go unreported.

Diplomatic immunity abuse has existed as long as the doctrine of diplomatic immunity itself.[99] In recent years, however, the number of

92. Pub. L. No. 95-393, 92 Stat. 808 (1978) (to be codified at 28 U.S.C. § 1364). *See* Note, *The Diplomatic Relations Act: The United States Protects Its Own*, 5 BROOKLYN J. OF INT'L L. 379, 384 (1979).

93. *See generally* Note, *supra* note 69, at 139-41.

94. Note, *supra* note 92, at 380.

95. Diplomatic Relations Act, *supra* note 15.

96. Note, *supra* note 30, at 1531.

97. *See generally* C. ASHMAN & P. TRESCOTT, *supra* note 32.

98. Vienna Convention, *supra* note 11, art. 41.

99. "From the moment of its recognition, diplomatic immunity has too often become a convenient vehicle for abuse, making diplomats who enjoy such privileges members of an 'overly protected class.' " Note, *supra* note 89, at 354.

incidents in the United States has been increasing.[100] Moreover, the gravity of the abuses that go unpunished is demanding increasing attention. "It is not unpaid parking tickets. It is not one rapist. It is indeed a full-scale epidemic of diplomatic crime. One felony is committed each week in New York [and] Washington, D.C., that is excused without prosecution . . . ."[101]

In addition to the large number of unpaid parking violations,[102] there are numerous reports of drug trafficking, weapons smuggling, and violent crimes, including rape and murder, committed by diplomats who are protected under the doctrine of diplomatic immunity. This Note, however, will consider only those abuses giving rise to civil liability. Only with respect to abuses of this nature, rendering claims for money damages, does the constitutional analysis and the proposal for a private cause of action against the United States Government appropriately apply.[103]

The number of diplomatic civil wrongs, like the number of diplomatic crimes, is on the rise.[104] Reports of theft, property damage, breach of contract, assault, and wrongful death are widely documented, but "traffic accidents and resulting injuries constitute the largest number of complaints regarding the misuses of diplomatic immunity."[105] Two such traffic accidents, involving David Hearne, the son of the Irish ambassador to the United States, and Alberto Watson-Fabrega, connected with the Panamanian embassy, exemplify the problem of immunity abuse and its inequities.

On November 11, 1959, David Hearne, reportedly involved in four prior instances of disorderly conduct, struck and killed a Washington, D.C., woman with his car.[106] Faced with a homicide charge, Hearne invoked diplomatic immunity. As a result, the charge against Hearne was dropped and no wrongful death suit was ever filed.

100. Note, *supra* note 30, at 1518. From August 1982 to February 1988 there were 147 criminal incidents in Washington, D.C. and New York involving diplomats and their staffs and dependents. *Bill Aims at Diplomat Crimes*, N.Y. Times, April 18, 1988, at 8, col. 4.

101. C. ASHMAN & P. TRESCOTT, *supra* note 32, at 11.

102. From April to October 1976, diplomatic personnel amassed 22,004 unpaid parking tickets worth $235,490. *Id.* at 339. In 1980, unpaid tickets imposed direct costs of $300,000 and a loss of revenue of $1.5 million upon the city of New York. *Id.* at 341. In Washington, from March 1976 to February 1977, diplomats had 37,905 outstanding tickets totaling $1,070,730. *Diplomatic Privileges and Immunities: Hearings and Markup before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 49 (1977) (statement of Rep. Stephen J. Solarz, New York).

103. "[T]he Claims Court's jurisdiction is limited to such cases where the Constitution or a federal statute requires the payment of money damages as compensation for the violation." Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987) (citing United States v. Mitchell, 463 U.S. 206, 218 (1983); United States v. Testan, 424 U.S. 392, 401-02 (1976)).

104. Note, *supra* note 17.

105. *Id.* at 125.

106. C. WILSON, *supra* note 13, at 187.

In 1974, 62-year old Dr. Halla Brown similarly was forced to bear the cost of America's policy of diplomatic immunity. Her story is an especially vivid example of the injustices inherent in this policy.

On April 20, Brown was riding in the passenger seat of a car that was struck by Alberto Watson-Fabrega, a cultural attaché to Panama. Brown was left a quadriplegic, despite three months in intensive care and several more months in a special rehabilitative hospital. Protected by diplomatic immunity, Watson-Fabrega avoided all liability. The Panamanian Government, under extreme pressure by American authorities, eventually paid Brown $10,000, not nearly enough to cover her nearly $300,000 medical bills or her $50,000 loss in yearly income.[107] These are only two of the hundreds of cases of this kind.[108]

In 1978, recognizing the prevalence of auto accidents, the drafters of the Diplomatic Relations Act included a provision requiring diplomats to carry auto insurance and a direct action for individuals against the insurance company.[109] These provisions, however, have done little to compensate individuals injured in accidents involving diplomats.[110] Moreover, nothing prevents diplomats from invoking immunity and avoiding liability altogether.[111]

The Diplomatic Relations Act covers no other tort actions against diplomats. Therefore, in addition to escaping liability for auto accidents because of loopholes in the Diplomatic Relations Act itself,[112] diplomats continue to avoid civil liability for all other tortious conduct. Furthermore, virtually nothing prevents diplomats from continuing this practice.

B. Reasons for Diplomatic Immunity Abuse

The main reasons for diplomatic immunity abuse are as follows: (1) the opportunity for abuse provided by the Vienna Convention and the Diplomatic Relations Act; (2) the lack of enforcement of diplomatic laws

107. C. ASHMAN & P. TRESCOTT, *supra* note 32, at 306-10; Comment, *supra* note 5, at 674 (citing Turan, *The Devilish Demands of Diplomatic Immunity*, Washington Post, Aug. 22, 1976, *reprinted in Diplomatic Immunity: Hearing on S. 476, S. 1256 and H.R.7819 Before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 126-33 (1978)).

108. *See generally*, G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 513, 515-30 (1942); *Diplomatic Privileges and Immunities, Hearings and Markup Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 43-46 (1977) (statement of Rep. Solarz).

109. Diplomatic Relations Act, *supra* note 15.

110. As one commentator points out, even where immunity is not invoked, the compensation provided is often entirely inadequate. Note, *supra* note 17, at 125-27.

111. "There remains no remedy under the DRA [Diplomatic Relations Act] against an immune diplomat who carries no insurance or whose policy has expired or is cancelled prior to a motor vehicle accident." Note, *supra* note 75, at 148 (citing Recent Development, *The Diplomatic Relations Act*, 13 J. INT'L L. & ECON. 471, 480 (1979)).

112. *See supra* note 121 and accompanying text.

by the receiving state; (3) the lack of cooperation by the sending state; and (4) the "Foreign Agent Explosion." Each reason is briefly discussed below.

1. The Vienna Convention and the Diplomatic Relations Act

The Vienna Convention was enacted not only to address inconsistencies in diplomatic law, but also to end the long-time practice of granting virtually absolute diplomatic immunity.[113] Professing to embrace the functional necessity theory, the Vienna Convention extends immunity based on the position held. For all its successes,[114] the Vienna Convention suffers from a number of deficiencies that enable diplomatic immunity abuse.

> The main weakness . . . is [the Convention's] failure to provide deterrence against violent conduct. This arises from the overbroad scope of immunity the Vienna Convention created through its erroneous application of the theory of functional necessity. Diplomatic immunity is overbroad because the Vienna Convention states immunity in terms of individuals and, thus, shields from jurisdiction more activities than is necessary.[115]

In addition, provisions declaring the inviolability of the mission,[116] the diplomatic agent,[117] his residence,[118] his papers,[119] and the diplomatic pouch,[120] inhibit the detection and prevention of abuses.

The Diplomatic Relations Act, while addressing some of these weaknesses, has not altered the provisions of the Convention to make detection or prevention of abuse any easier. In addition, the Act has had little success in deterring diplomats from violating local laws and invoking their privileged status.[121]

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113. *See supra* notes 73-78 and accompanying text.

114. *See supra* note 78 and accompanying text.

115. Note, *supra* note 73, at 210.

116. "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention, *supra* note 11, art. 22(1).

117. "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." *Id.* art. 29. In addition, "[a] diplomatic agent is not obliged to give evidence as a witness." *Id.* art. 31(2).

118. "The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." *Id.* art. 30(1).

119. "His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability." *Id.* art. 30(2).

120. "The diplomatic bag shall not be opened or detained." *Id.* art. 27(3).

121. *See* Note, *supra* note 30, at 1530; *see also* Note, *supra* note 17, at 137 ("still enables eligible diplomats to violate local laws without any fear of legal consequences.").

2. Lack of Enforcement by the Receiving State

Under the Vienna Convention, the receiving state has the power to declare any embassy employee *persona non grata* and to expel him or her from the receiving state.[122] According to one commentator writing in 1981, this power was "not on record as having ever been used."[123] Nevertheless, the United States has, in fact, invoked this power, but only in cases involving espionage.[124] Even in this area, however, the fear of retaliation has persuaded the United States Government to use the *persona non grata* and expulsion powers very cautiously. A recent incident demonstrates the explosive potential of exercising these powers.

On March 8, 1989, the United States Government expelled Lieutenant Colonel Yuri N. Pakhtusov, a Soviet military attaché stationed at the Soviet embassy in Washington, D.C., for alleged spying.[125] One week later, on March 15, 1989, the Soviet Government expelled Lieutenant Colonel Daniel Francis Van Gundy, an assistant army attaché stationed at the American embassy in Moscow, openly "acknowledging that the expulsion was a diplomatic tit for tat."[126] Given this response to the United States Government's exercising the *persona non grata* and expulsion powers on its own initiative, it is hardly surprising that these powers are not employed upon the complaint of a private citizen.[127]

A second practice that contributes to continuing abuses is the overextension of diplomatic immunity by the receiving state. "Under the Vienna Convention, the State Department has the broad discretion to classify diplomats."[128] That classification, which determines the degree of immunity granted to an individual, is binding on the courts.[129]

An examination of State Department practice discloses a consistent pattern of extending diplomatic immunity whenever possible.[130] Some

122. Vienna Convention, *supra* note 11, art. 9.

123. Note, *supra* note 89, at 362.

124. *See* Comment, *supra* note 5, at 672 n.51.

125. Gamarekian, *The Thaw of Glasnost Warms Social Circuit*, N.Y. Times, Mar. 15, 1989, at B6, col 1; Keller, *Moscow Expels Attaché in Response to 'Provocation,'* N.Y. Times, Mar. 16, 1989, at A14, col. 1.

126. Keller, *supra* note 125.

127. "The largely political use of the expulsion power . . . makes expulsion for less serious misconduct unlikely. Indeed, there seems to be no case in which a diplomat was expelled for causing a purely private injury." Comment, *supra* note 5, at 672 n.52.

128. Abdulaziz v. Metropolitan Dade County, 741 F.2d 1328, 1331 (11th Cir. 1984).

129. Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944); *see also* Arcaya v. Paez, 145 F. Supp. 464, 467 (S.D.N.Y. 1956) ("The questions of the diplomatic status enjoyed by a given defendant and the immunity to be accorded him are . . . questions where a determination of the Department of State is binding upon the court."); *Abdulaziz*, 741 F.2d at 1329 ("once the Department of State has regularly certified a visitor . . . as having diplomatic status, the courts are bound to accept that determination . . . .").

130. In some cases, those who are not entitled to full immunity are extended it nonetheless. C. ASHMAN & P. TRESCOTT, *supra* note 32, at 227.

authorities have attributed the frequency of this practice to the fact that the "State Department . . . is susceptible to undue foreign political pressure when making immunity determinations."[131] Certainly, the fear of retaliation strongly influences such decisions.

3. *Lack of Cooperation by the Sending State*

The lack of cooperation by the sending state is another factor contributing to continuing diplomatic immunity abuses. Under the Vienna Convention, a sending state may waive the immunity of a diplomat.[132] Nevertheless, like the receiving state's powers of expelling and declaring a diplomat *persona non grata*,[133] the sending state's power of waiver is rarely invoked. Frequently, even when a diplomat's culpability is clear, the sending state will deny all accusations and cloak its diplomat in complete immunity.[134]

In addition, the Vienna Convention makes it clear that although a diplomat may not be subject to the jurisdiction of the receiving state's courts, he or she is unquestionably subject to the jurisdiction of the sending state's courts.[135] Therefore, a victim of diplomatic immunity abuse is entitled, at least theoretically, to bring suit against an offending diplomat in the diplomat's country.[136] In practice, the victim's right to sue a diplomat in the diplomat's home country is rarely exercised.[137]

> In addition to the prohibitive expense, the cultural and political climate of the sending state could also pose a problem. For instance, the sending state may have a radically different system of law. The offenders thus might not face the same punishment as they would in the receiving state. Moreover, a hostile political climate might block the victim's recovery.[138]

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131. Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 186 (1986) (citing Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va. 1961), *aff'd*, 295 F.2d 24 (4th Cir. 1961); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966)).

132. Vienna Convention, *supra* note 11, art. 32(1).

133. *See supra* notes 122-124 and accompanying text; *see also* Dickinson v. Del Solar, 1 K.B. 376 (1930); Taylor v. Best, 14 C.B. (5 J. Scott) 487 (1854). *But see* U.S. v. Arizti, 229 F. Supp. 53 (S.D.N.Y. 1964) (sending government did waive immunity and defendant-diplomat was tried and convicted).

134. Note, *supra* note 30, at 1526.

135. Vienna Convention, *supra* note 11, art. 31(4). "Diplomats are not immune to *trial* they are only immune to trial in the receiving state." *Diplomatic Privileges and Immunities: Hearings and Markup Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 125 (1977).

136. Dickinson v. Del Solar, 1 K.B. 376 (1930).

137. Hill, *Sanctions Constraining Diplomatic Representatives to Abide by the Local Laws*, 25 AM. J. INT'L L. 252, 268 (1931).

138. Note, *supra* note 30, at 1533.

4. The "Foreign Agent Explosion"[139]

Finally, the dramatic increase in the number of individuals granted diplomatic status and the concomitant decline in care given to screening applicants for the diplomatic corps have influenced the rise in diplomatic immunity abuse. In 1978, 30,000 people in the United States had been granted some form of diplomatic immunity.[140] In addition, many of these new diplomats have far less experience and are significantly less qualified than diplomats twenty years ago.

In a survey conducted by the Foreign Service regarding the new breed of diplomats, one respondent stated, "In former years, the diplomatic profession was 'aristocratic'; today it has not only become 'democratic' but highly 'vulgarized.' 'Ministers' and 'Third Secretaries' are about a 'dime a dozen,' . . . —and very inexperienced—prone in none too few cases, to abuse their position . . . which tends to cheapen the profession."[141] Unless current practices change, which appears highly doubtful, diplomatic immunity abuse will continue.

III. Diplomatic Immunity: A Constitutional Analysis

A. A Balancing of Interests

Every constitutional analysis of governmental legislation, regulation, or action involves a balancing of interests and harms. The goal of such an analysis is to promote governmental policies that benefit the public welfare and, at the same time, to prevent the enactment of those policies that unnecessarily infringe upon individual liberty.[142]

As discussed in Part I, "[t]here are powerful reasons for diplomatic immunity; but these reasons should be balanced against the need to protect . . . the rights of the victims."[143] Although the United States Government has the constitutional authority to create legislation and negotiate treaties, its power remains subject to constitutional constraints. As the Supreme Court has held:

> Broad as the power of the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.[144]

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139. C. WILSON, *supra* note 13, at 269.

140. S. REP. NO. 958, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1935-41.

141. C. WILSON, *supra* note 13, at 221-22.

142. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 3 (1972).

143. Note, *supra* note 30, at 1517.

144. Perez v. Brownell, 356 U.S. 44, 58 (1958); *see also* Reid v. Covert, 354 U.S. 1, 16 ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other

While the United States Government may not adopt policies which violate the constitutional rights of its citizens, it is bound to honor its international commitments and to abide by the Law of Nations. To permit the United States, or any signatory of an international agreement or member of the international community, to avoid its international obligations would lead to a "dislocation of the [international] community."[145]

For example, in the area of diplomatic relations, the revocation by the United States of diplomatic immunity could seriously endanger the lives of American diplomats abroad. Under the doctrine of reciprocity, any country dealing with the United States would not be obligated to extend immunity to American diplomats. Furthermore, revocation could severely disrupt American foreign policy and international relations in general.

The United States is faced therefore with a dilemma: whether to abandon the doctrine of diplomatic immunity or to keep it intact and address its possible unconstitutionality.

B. Does Diplomatic Immunity Constitute a Taking Under the Fifth Amendment?

1. The Takings Clause

The Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use,[146] without just compensation"[147] and applies to the states through the Fourteenth

branch of Government, which is free from the restraints of the Constitution."); Finzer v. Barry, 798 F.2d 1450, 1482 (D.C. Cir. 1986) (Wald, C.J., dissenting) ("The Law of Nations clause, like the commerce clause or any other source of congressional authority, can be exercised only subject to express limitations found elsewhere in the Constitution . . . ."). Thus, Congress may not enact any piece of legislation or ratify any treaty which impinges upon Americans' constitutional rights.

145. Administration Des Douanes v. Societe Cafes Jacques Vabre and Weigel et Compagnie, 2 C.M.L.R. 336, 358 (1971).

146. Private property may not be taken for private use. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). As Justice Chase stated in often-quoted dicta in *Calder*, no law may "take[] property from A and [give] it to B" and any law which does so is void. *Id.* at 388 (seriatim opinion). The Court has recently construed the requirement of "public use" very broadly, however, with the result that what is considered a "public use" often depends on semantics. As long as the government's exercise of power is "rationally related to a conceivable public purpose," the public use requirement is satisfied. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984). Only when a congressional determination of what constitutes a public use "involve[s] an impossibility" will it be invalidated. Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925).

147. U.S. CONST. amend. V. Under the Just Compensation Clause, "[t]he owner is entitled to the fair value to the owner (not the worth to the government) at the time of the taking." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 590 n.11 (2d ed. 1988) (citing Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973); United States v. Reynolds, 397 U.S. 14, 16 (1970); Monongahela Navigation v. United States, 148 U.S. 312, 326, 343 (1893)).

Amendment.[148] The Supreme Court has indicated that the language of the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[149] Indeed, "the Amendment . . . is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[150] When a taking does occur, the Just Compensation Clause is an assurance to the private individual that the government will not force him or her "to bear public burdens which, in all fairness and justice, should be born by the public as a whole."[151]

Precisely what constitutes "fairness and justice," however, is a matter of judicial discretion, subject to varied interpretations. The Supreme Court has conceded that there is no " 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[152] Therefore, whether a particular governmental interference with property constitutes a compensable taking requires a case-by-case analysis of the particular factual circumstances presented.[153] As a result, the Just Compensation Clause has not been uniformly nor predictably applied. This disparity of application is illustrated by the Court's holdings in *United States v. Caltex, Inc.*[154] and *Causby v. United States*.[155]

148. Chicago, Burlington & Quincy Ry. v. Chicago, 166 U.S. 226 (1897). Although the Fourteenth Amendment does not specifically refer to either takings or just compensation, some commentators claim that the Fifth Amendment just compensation requirement is incorporated into the Fourteenth Amendment Due Process Clause, which, although more general than the Fifth Amendment clause, contains the same ban on takings of private property without just compensation. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 400-01 (3d ed. 1986).

149. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987).

150. *Id.* at 315 (emphasis in original).

151. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also First English Evangelical Lutheran Church*, 482 U.S. at 311. *Contra* Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (New York City Landmark Preservation Law held not to be a compensable taking despite the fact that the scheme negatively affected only a tiny minority of the city's landowners while resulting in long-term economic benefits for the city as a whole); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (court upheld a scheme under which the island's large landholdings owned by 22 individuals were taken by eminent domain and broken up for the benefit of thousands of small lessees); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 21 (1986) (court upheld federal legislation which required employers withdrawing from multiemployer pension plan to pay proportionate share of plan's unfunded vested benefits when employer's actual debt to the plan was considerably less under collective bargaining agreement).

152. *Penn Central Transportation*, 438 U.S. at 124 (citation omitted).

153. *See, eg.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

154. 344 U.S. 149 (1952).

155. 328 U.S. 256 (1946).

In *Caltex*, the Court held that the United States had to compensate a Manilan oil producer for oil "taken" in the Philippines and used or destroyed by American armed forces during World War II. The United States did not, however, have to pay for the plaintiff's oil terminal facilities which were destroyed by American troops to prevent their capture by the enemy. The Court found that the army's destruction of private property during wartime was a cost that must be borne by individual owners.[156]

By contrast, in *Causby*, the Court found that the loss of the plaintiff's chicken-farming business, caused by low-flying military planes[157] frightening the plaintiff's chickens, constituted a compensable taking under the Fifth Amendment.[158] In addition, the Court held that the army's use of the plaintiff's airspace merited compensation.[159]

Why the difference in the outcome of these two cases? According to one author,

> the difference between *Caltex* and *Causby* . . . may appear to be a difference between more-or-less literal and more-or-less "sophisticated" interpretations of "taking" and "public use"; at bottom, of course, they represent differences as to *whether economic loss resulting from a national policy shall be suffered wholly by those directly affected or borne by the community as an element in the cost of that policy.*[160]

The answers to this question and to what constitutes "justice and fairness" depend, in large part, on the competing governmental and private interests involved and the means employed to advance the governmental interest.

The United States Government's policy of extending diplomatic immunity facilitates foreign relations and, thereby, benefits the American public. At the same time, the burdens of this policy are disproportion-

156. 344 U.S. at 154-56; *accord*, United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (a 1942 War Production Board order that nonessential gold mines be temporarily closed to enable the use of mining personnel and machinery in more essential operations during wartime held not to be a taking even though closure deprived gold mine owner of opportunity for profit); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (government's requisition of steel manufacturer's entire production for 1918, making it impossible for manufacturer to produce steel for others, held not to be a taking of customer's property despite customer's contract with steel company).

157. The military planes in *Causby*, unlike those in *Caltex*, were being flown during peacetime.

158. As a result of the noise [from the planes] respondents had to give up their chicken business. As many as six to ten chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm.

United States v. Causby, 328 U.S. 256, 256 (1946).

159. *Id.* at 256-67.

160. L. HENKIN, *supra* note 142, at 259-60 (emphasis added).

ately levied on a small number of individuals. These individuals, denied redress for diplomatic abuses under the doctrine of diplomatic immunity, are forced to cover their own losses. As illustrated in Part II,[161] these losses can be staggering.

Although the United States Government has legitimate interests in protecting its diplomats abroad and in promoting international relations, both of which are advanced by the policy of granting diplomatic immunity, those individuals harmed by diplomats have an arguably equal interest in redressing their injuries which this policy denies. Consequently, the issue arises whether an individual who is harmed by a diplomat, but is prohibited from either recovering his or her property or instituting a suit by the doctrine of diplomatic immunity, has a takings claim against the United States Government.

This Note proposes that such a prohibition constitutes a compensable taking under the Fifth and Fourteenth Amendments. The taking may involve either physical property, through, for example, shoplifting or theft, or less tangible property interests, such as the right to bring a cause of action. While tangible property interests clearly fall within the traditional definition of "property," intangible property interests have proved more problematic under the takings analysis.

A number of commentators have asserted, however, that "the granting of diplomatic immunity may constitute a taking of a private litigant's property interest."[162] According to these commentators and dicta in recent cases, because of the expanding judicial definitions of "property" and "taking," "courts are [now] holding out the possibility of recovery in areas heretofore foreclosed."[163] Therefore, "even though . . . no court [to date] has allowed compensation under the takings clause,"[164] victims of diplomatic immunity abuse may anticipate compensation for their losses, both tangible and intangible, in the near future.

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161. *See supra* notes 104-108 and accompanying text.

162. Note, *Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy*, 97 YALE L.J. 299, 307 n.35 (1987) (citing L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 264-65 (1972)). While there are those who support this argument, it is important to point out that as of 1972,

> [n]o one [had] successfully argued in the Supreme Court that in purporting to dispose of private claims, in the details of a particular settlement, in the procedures established for making awards to private claimants, in Congressional legislation providing (or failing to provide) for award and payment, the United States deprived the original claimants of property without due process of law, impaired the obligation of their contracts or appropriated their claims for a public purpose and was obligated to pay them just compensation for any loss.

L. HENKIN, *supra* note 142, at 263.

163. Note, *supra* note 162, at 307 n.5 (citing Dames & Moore v. Regan, 453 U.S. 654 (1981); Ramirez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983), *rev'd* 745 F.2d 1500 (D.C. Cir. 1984), *vacated* 471 U.S. 1113 (1985)).

164. *Id.*

Before discussing what type of compensation victims of diplomatic immunity abuse are entitled to, this Note will examine (1) the property interest involved, and (2) the nature of the "taking."

2. Is a Cause of Action Considered "Property" Under the Takings Clause?

State law, not the Constitution, defines what constitutes a compensable property interest.[165] In 1796, the Supreme Court held in *Ware v. Hylton* that "claims for compensation are property interests that cannot be taken for public use without compensation."[166] This holding, which is still valid law today, supports the contention that claims against diplomats are compensable property interests. Yet, subsequent decisions by the Court defining compensable property interests have subjected this contention to scrutiny.

Since that time, the Court rarely has found a compensable taking unless the property interest involved is tangible, such as land, or vested, such as a right under a valid and performed contract. "The less traditional the property, the less likely the Court has been to find that there has been an uncompensated taking."[167] As a result, while victims of diplomatic theft have a traditionally recognized property interest deserving compensation under the Takings Clause, those with less traditional expectation interests, such as a cause of action, may have difficulty sustaining a takings claim. Indeed, the Court has, until recent years, consistently denied compensation for intangible or speculative property interests.

In *United States v. Petty Motor Co.*,[168] the Court, in denying Petty Motor's takings claim, held that a renewal expectation on a lease was not property requiring just compensation. Fourteen years later, in *Flemming v. Nestor*,[169] the Court held that future social security payments were mere "expectations" and "not property subject to compensation" under the Takings Clause.[170] More recently, in *Duke Power Co. v. Carolina Environmental Study Group*[171] and again in *Andrus v. Allard*,[172] the

165. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 148, at 401 n.4; *see also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

166. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 245 (1796); *see* Gray v. United States, 21 Ct. Cl. 340, 392-93 (1886); Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974).

167. L. TRIBE, *supra* note 147, at 610.

168. 327 U.S. 372 (1946).

169. 363 U.S. 603 (1960).

170. *Id.*

171. 438 U.S. 59 (1978).

172. 444 U.S. 51 (1979); *accord* Chang v. U.S., 859 F.2d 893 (Fed. Cir. 1988) (court denied appellant's claim to "the loss of the contingent right to future income for services yet to be rendered" because "[s]uch future damages are speculative and merely consequential to the valid exercise of governmental power." *Id.* at 898.).

Court denied takings claims because the property interests involved were too "remote."

In *Duke Power Co.*, the respondents contended that the Price-Anderson Act, which limited a nuclear power plant's liability to $560 million in the event of an accident, provided inadequate compensation and therefore constituted a taking. In *Andrus*, the petitioner asserted that the Eagle Protection Act, which prohibited the petitioner from selling Indian artifacts made with eagle feathers, was a "taking" of his future profits. In rejecting the petitioner's claim, the Court held that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."[173]

Despite the Court's traditional attitude,

> [t]he body of rules determining which expectations constitute compensable property interests and which do not . . . plainly requires reconsideration in light of the broader definition of property interests now employed in the law of procedural due process. . . . There seems no good reason why the broader definition, incorporating wholly intangible forms of property, should not be extended to the takings context. Indeed, some of the Supreme Court's recent decisions suggest it is inching toward just such a broadening conception of 'property' in takings analysis.[174]

As expected, lower courts, following the Supreme Court's lead, are also lengthening the list of recognized compensable property interests.[175]

In *Armstrong v. United States,*[176] the Supreme Court found the government's destruction of a materialman's lien to be a "taking" of a "property interest protected by the Fifth Amendment Just Compensation Clause."[177] Some years later, in *Mennonite Board of Missions v. Adams*[178] and *Murray v. United States,*[179] the Supreme Court and the Court of Appeals for the Federal Circuit, respectively, held that a mortgagee's lien constituted a "property interest within the meaning of the Fifth Amendment."[180]

In 1974, the Supreme Court "implicitly held that the sole shareholder of a corporation has a constitutionally protected property interest

173. 444 U.S. at 66.

174. L. TRIBE, *supra* note 147, at 590-91 n.11 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), for the proposition that there is a broader definition).

175. Murray v. United States, 817 F.2d 1580 (Fed. Cir. 1987).

176. 364 U.S. 40 (1960).

177. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1520 n.77 (D.C. Cir. 1984) (citing Armstrong v. United States, 364 U.S. 40 (1960)); *see also Armstrong*, 364 U.S. at 48.

178. 462 U.S. 791 (1983).

179. 817 F.2d 1580 (Fed Cir. 1987).

180. *Id.* at 1583 (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935)).

in corporate assets."[181] Following this precedent, the Court of Appeals in *Ramirez de Arellano v. Weinberger* determined that the plaintiff-shareholders of a corporation owning title to land in Honduras possessed a "concrete and protected interest in the property allegedly occupied and used by the United States defendants."[182] "The fact that . . . plaintiffs [did] not directly hold legal title to the real property [did] not deprive them of a property interest in the assets nor [did] it defeat their constitutional claims."[183]

Similarly, in *Ruckelshaus v. Monsanto Co.*,[184] the Supreme Court found a taking of "property" when the Federal Insecticide, Fungicide and Rodenticide Act required publication of petitioner's trade secrets without compensation.[185]

As these cases illustrate, "constitutional provisions protecting property extend to property interests not secured by legal title."[186] The Court, in broadening its definition of compensable property interests, thus appears to be returning to its 1796 holding.[187]

3. *Is There a Taking?*

Although the property in question may constitute a compensable property interest, "the Fifth Amendment renders the Government liable only if there was a 'taking' by it of such interest."[188] The Supreme Court has found that a taking exists when the government effects a permanent "physical occupation of property,"[189] a virtual destruction of property value due to governmental regulation,[190] or a reasonable "expectation

181. *Ramirez*, 745 F.2d at 1518 (citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 117 (1974)).

182. 745 F.2d at 1518.

183. *Id.*; ("Likewise, this circuit acknowledged in *Nielsen v. Secretary of the Treasury* that shareholders have a property interest in assets of a corporation." 424 F.2d 833, 843 (D.C. Cir. 1970)).

184. 467 U.S. 986 (1984).

185. Only Monsanto's disclosures of trade secrets from 1972-78 were considered compensable property interests. Disclosures made subsequent to 1978 were not protected under the Fifth Amendment. *See* W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 417 n.a (6th ed. 1986).

186. *Ramirez*, 745 F.2d at 1520 n.77.

187. *See supra* note 166.

188. Armstrong v. United States, 364 U.S. 40, 49 (1960) (Harlan, J. joined by Frankfurter, J. and Clark, J., dissenting).

189. *See* United States v. Causby, 328 U.S. 256 (1946); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (Court formulated a *per se* rule that a permanent physical occupation automatically constituted a taking and applied it to invalidate a statute that required landlords to permit cable television companies to install their cable facilities on the landlord's rental property).

190. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Pennsylvania regulation preventing subsurface mining constituted an appropriation or destruction of property when the right to mine had been reserved by the seller of surface rights to land); *see also* Benenson v.

that an intangible property interest [will] not be used by the government and such expectation [is] impaired."[191] This Note will focus on the third category of taking.

A victim of any harm possesses the right to bring a cause of action against the perpetrator of that harm. Such a claim, as discussed above, is a property interest.[192] When the perpetrator of the harm is a diplomat, however, the United States Government impairs the victim's right to bring a cause of action for the sake of international relations. Regulations such as those under the Vienna Convention deny a victim of diplomatic immunity abuse the right to bring a cause of action and effectively destroy the victim's claim for compensation.

When the property interests of a few individuals are sacrificed for the benefit of the nation in the course of either domestic or foreign policy-making, a taking has occurred and compensation should be made under the terms of the Fifth Amendment. The Supreme Court, however, has been somewhat reluctant to extend the takings analysis to foreign policy.

In *Dames & Moore v. Regan*,[193] the Supreme Court upheld President Carter's Executive Orders nullifying attachments of Iranian assets and authorizing the transfer of these assets to Iran. The Court also upheld President Reagan's ratification of Carter's orders as well as Reagan's subsequent suspension of all claims by United States nationals against Iran that could be presented to an International Claims Tribunal.[194] According to the majority, Carter and Reagan, having acted pursuant to the International Emergency Economic Powers Act and in

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United States, 548 F.2d 939 (Ct. Cl. 1977) (government regulation preventing building owner from conducting investigation for renovation or from demolishing building and using site for other purposes resulted in negative market value and constituted a taking). Nevertheless, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong*, 364 U.S. at 48 (citing Omnia Commercial Co. v. United States, 261 U.S. 502, 508-10 (1922)).

191. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 148, at 401.

192. *See supra* notes 165-187 and accompanying text.

193. 453 U.S. 654 (1981).

194. The following is a summary of the facts surrounding *Dames & Moore*:

On November 14, 1979, in response to the seizure of American diplomatic personnel at the American embassy in Tehran on November 4, President Carter declared a national emergency pursuant to the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U.S.C. §§ 1701-1706 (1976 ed., Supp. III). By Executive Order and pursuant to Title 50 U.S.C. § 1702(a)(1)(B) (1976 ed., Supp. III), which empowers the President to

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest,

the President blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran

compliance with Executive Agreements (the "Algerian Declarations"[195]) between the U.S. and Iran, had not exceeded their executive powers granted under the Constitution.[196] Emphasizing the narrowness of its decision,[197] the Court concluded that

> where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[198]

As a result of the President's action, however,

> [c]reditors with enforceable contract rights lost the ability to satisfy their claims against Iran out of the previously frozen assets. Their only recourse was to arbitration in a special international claims tribunal which possessed a limited capacity to satisfy the enormous claims of creditors, because it held only $1 billion and a pledge—of

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which are or become subject to the jurisdiction of the United States. . . ." Exec. Order No. 12170, 3 C.F.R. 457 (1980).

With the President's authority, the Office of Foreign Assets Control of the Treasury Department announced on November 15, 1979, that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran." 31 C.F.R. § 535.203(e) (1980). Thereafter, President Carter authorized judicial proceedings against Iran, "includ[ing] pre-judgment attachment," 31 C.F.R. § 535.418, but precluded "entry of any judgment or . . . decree or order of similar or analogous effect . . . ." 31 C.F.R. § 535.504(a).

On January 19, 1981, Iran and the United States signed the Algerian Declarations which settled the Iranian hostage crisis, terminated all litigation between the parties and their nationals, and established an Iran-United States Claims Tribunal in the Hague to arbitrate claims. In return for the release of the American hostages, the United States agreed to "terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, [and] to prohibit all further litigation based on such claims, . . . through binding arbitration." (App. to Pet. for Cert. 22). President Carter also ordered all banks holding Iranian assets to transfer them "to the Federal Reserve Bank of New York, or to be held or transferred as directed by the Secretary of the Treasury." Exec. Order No. 12279, 46 Fed. Reg. 7919. On January 20, 1981, the hostages were released.

After taking office, President Reagan ratified President Carter's January 19th Executive Orders on February 24, 1981. Exec. Order No. 12294, 46 Fed. Reg. 14111. In addition, the new President suspended all claims that could have been brought before the International Tribunal pursuant to the Algiers Declarations. *Id. See Dames & Moore*, 453 U.S. at 662-66.

195. The two Algerian Declarations are the Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981) (the "General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and Government of the Islamic Republic of Iran, 20 Int'l L. Materials 230 (1981) (the "Claims Declaration").
Behring International, Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 660 n.2 (1983).

196. *Dames & Moore*, 453 U.S. at 688.

197. *Id.* at 661, 688.

198. *Id.* at 688.

> dubious value—of future payments by Iran. Thus the settlement sacrificed the financial interests of a narrow class of American creditors and forced them to bear the entire burden of obtaining the release of the hostages.[199]

According to the petitioner in *Dames & Moore*, "the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment . . . in the absence of just compensation."[200] The Court's response to the petitioner's takings claim, however, has created some confusion. On the one hand, the majority "conclude[d] that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, the petitioner did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation."[201] On the other hand, the Court stated that, "[t]hough we conclude that the President has settled [the] petitioner's claims against Iran, we do not suggest that the settlement has terminated [the] petitioner's possible taking claim against the United States."[202] Declining to adjudicate the petitioner's claim on the ground that it was "not ripe for review,"[203] the Court held that "after the international arbitration process had run its course, the . . . claimants could bring a takings claim against the United States in the Court of Claims, now Claims Court."[204] This holding explicitly rejected the contention that "the 'treaty exception' to the jurisdiction of the Court of

199. L. TRIBE, *supra* note 147, at 612. While Tribe underscores the inadequacy of the tribunal's funds, other authorities assert that claimants would be more than adequately compensated. *See, e.g.*, Sperry Corp. v. United States, 853 F.2d 904, 905 (Fed. Cir. 1988) (referring to the " 'Security Account' established by Iran with an initial deposit of $1 billion, and in which Iran promised to maintain a minimum balance of $500 million until all Tribunal awards are paid"); *see also* E-Systems, Inc. v. United States, 2 Cl. Ct. 271, 273 (1983).

200. 453 U.S. at 688.

201. *Id.* at 674 n.6. The Court emphasized the "contingent nature of [petitioner's] interest." *Id.* at 673.

202. *Id.* at 688 n.14.

203. *Id.* at 689 (citations omitted).

204. Trimble, *Foreign Policy Frustrated*—Dames & Moore, *Claims Court Jurisdiction & A New Raid on the Treasury*, 84 COLUM. L. REV. 317, 323 (1984) (citation omitted); *Dames & Moore*, 453 U.S. at 688-90. Justice Powell, writing in a separate opinion, concurring in part and dissenting in part, disagreed with the majority's holding that "the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation." *Dames & Moore*, 453 U.S. at 690. According to Justice Powell, takings claims involving either the nullification of attachments or the suspension and settlement of claims against Iran, should be "le[ft] . . . open for resolution on a case-by-case basis in actions before the Court of Claims." *Id.* Whether pursuant to Executive Order or International Agreement, "[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution." *Id.* at 691 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960); Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980)).

Claims, 28 U.S.C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim [the] petitioner might bring."[205] In its final analysis, the Court "[saw] no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act."[206]

The Court's decision in *Dames & Moore* holding the "treaty exception" inapplicable has met with strong opposition. One commentator, Phillip Trimble, argues that the Court

> misconstrued the critical statutory provision (the treaty exception to Claims Court jurisdiction for treaty-related matters), overlooked important precedents, misread other decisions, and ignored a long-standing jurisdictional principle.
>
> Of more fundamental importance, the Court in *Dames & Moore* departed from a tradition of judicial deference to the political branches of government over matters closely involving foreign affairs.[207]

In "recognizing an unprecedented judicial remedy for those whose interests are adversely affected by United States foreign policy,"[208] the Court has, according to Trimble, created the "prospect of takings liability for a wide range of foreign policy actions[; this potential liability] threatens to have a significant effect on the foreign policy decision-making process generally."[209]

Although there are a few cases "following the Supreme Court's lead"[210] and giving credence to Trimble's fears, the takings issue has not been entirely resolved and in subsequent cases, lower courts have declined to reach a decision on this issue.

In *Chas. T. Main International, Inc. v. Khezestan Water & Power Authority*,[211] another case filed in the aftermath of the Iranian hostage crisis, Main asserted a takings claim for payment owed under two contracts between itself and the Iranian Government. The money owed to

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205. *Dames & Moore*, 453 U.S. at 689. The "treaty exception," codified at 28 U.S.C. § 1502, provides: "Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations."

206. *Dames & Moore*, 453 U.S. at 689-90. The Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (1982)) is discussed *infra* note 272.

207. Trimble, *supra* note 204, at 318-19.

208. *Id.* at 318.

209. *Id.* at 319.

210. As Trimble indicates, in Causey v. Pan American World Airlines, 684 F.2d 1301, 1311-13 (9th Cir. 1982), "the Ninth Circuit has held that persons whose rights against international air carriers are limited by the Warsaw Convention may bring a takings action in the Claims Court, notwithstanding the statutory bar to jurisdiction," and in Shanghai Power Co. v. United States, dismissed, No. 674-81C (Ct. Cl. Dec. 30, 1983) (appeal pending) "a litigant whose interests were adversely affected by the United States-China Claims Agreement has initiated a takings action in the Claims Court." Trimble, *supra* note 204, at 319.

211. 651 F.2d 800 (1st Cir. 1981).

Main for its performance under the contracts had been transferred and Main's claims against Iran had been suspended pursuant to the Executive Orders and Algerian Declarations discussed above. As the Supreme Court had in *Dames & Moore*, the Court of Appeals in *Main* upheld the validity of the Presidents' actions leading to the hostages' release and held that the takings "issue [was] neither properly presented nor ripe for review."[212]

Two years later, in *Behring International, Inc. v. Imperial Iranian Air Force*,[213] in which "[t]he facts [were] all but indistinguishable from the facts of *Dames & Moore* . . . ,"[214] the United States Court of Appeals for the Third Circuit once again upheld Presidential action in response to the Iranian hostage crisis. Following *Dames & Moore* and *Main*, the court again "defer[red] expressing any opinion on the merits of"[215] Behring's fifth amendment argument because, as in the preceding cases, it was "not ripe for review."[216] According to the *Behring* court, "[t]he takings claim in the instant case is, if anything, even less ripe than the takings claim in *Dames & Moore*. In *Dames & Moore*, plaintiff had obtained judgment for a sum certain. . . . In the instant case, by contrast, the claim has not been reduced to judgment."[217]

Although these courts have deferred deciding the takings issue, they have not denied such claims. As in *Dames & Moore*, the courts in *Main* and *Behring* left open the possibility that plaintiffs could argue their takings claims once these claims had ripened. "The parties have not irretrievably lost their judicial remedies; rather, those remedies have been suspended pending arbitration."[218]

The judiciary's recognition of takings claims in *Dames & Moore*, *Main*, and *Behring* sets the necessary precedent to allow takings claims in areas previously beyond the reach of the Fifth Amendment. More specifically, it lends strong support to the proposition that individuals denied the right to bring suit against diplomats have a compensable takings claim against the United States Government. This proposition is further buttressed by the absence of an "alternative forum . . . capable of providing meaningful relief"[219] to victims of diplomatic immunity abuse.

According to one commentator, international agreements under which "the President agree[s] to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum pay-

212. *Id.* at 814.
213. 699 F.2d 657 (3d Cir. 1983).
214. *Id.* at 663.
215. *Id.* at 664-65.
216. *Id.* at 665 (quoting *Dames & Moore*, 453 U.S. at 688-89).
217. 699 F.2d at 665.
218. *Id.* at 665 n.5 (quoting American Intern Group v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981)).
219. 453 U.S. at 687.

ments or the establishment of arbitration procedures"[220] are an " 'established international practice.' "[221] Although a settlement agreement was made under the Algerian Declarations, the Vienna Convention does not provide a mechanism for settling claims or for any other form of effective relief. Consequently, a victim of diplomatic immunity abuse has no means of effective recovery.[222] In contrast, although the petitioners in *Dames & Moore*, *Main*, and *Behring* were not provided with compensation under the Takings Clause, they "receiv[ed] something in return for the suspension of their claims, namely, access to an international tribunal before which they [could] well recover something on their claims."[223]

"[T]he availability of a suit for just compensation will (if the taking was constitutionally authorized . . .) quiet contentions that a taking is a violation of the fifth amendment."[224] The availability in *Dames & Moore*, *Main*, and *Behring* of an alternative forum appears to have influenced the courts' decisions to defer deciding the takings claims.[225] Conversely, the absence of any remedy for victims of diplomatic immunity abuse strengthens the validity of the assertion that they have a takings claim against the government. This conclusion is supported by *Morgan Guaranty Trust Co. of New York v. Republic of Palau*,[226] in which the court found a taking because the petitioners were "without access to any tribunal where they [could] be assured of the enforcement of their . . . rights . . . ."[227]

220. *Id.* at 679.

221. *Id.* (quoting L. HENKIN, *supra* note 142, at 262).

222. Although a victim of diplomatic immunity abuse might be able to file a direct action against a diplomat's insurer under the Diplomatic Relations Act or sue a diplomat in the diplomat's country, neither course of action is guaranteed or likely to be effective in obtaining compensation. *See supra* notes 109-111, 136-137 and accompanying text.

223. *Id.* at 687.

224. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1526 (D.C. Cir. 1984) (citing Larson v. Domestic & Foreign Corp., 337 U.S. 682, 697 n.18 (1949)); *see also Larson*, 337 U.S. at 703 n.27 ("There is no claim that [the action challenged] constituted an unconstitutional taking. . . . There could not be since the respondent admittedly has a remedy . . . in the Court of Claims."); E-Systems, Inc. v. United States, 2 Cl. Ct. 271, 279 (1983) ("[T]he ultimate availability of the Tucker Act remedy, allowing suit in the Court of Claims for any deficiency in just compensation, barred any determination that the Rail Act was unconstitutional as allowing a taking without just compensation.") (citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 148-49 (1974)).

225. *Dames & Moore*, 453 U.S. at 689-90; *Main*, 651 F.2d at 815; *accord* Morgan Guaranty Trust Co. v. Republic of Palau, 680 F. Supp. 99 (S.D.N.Y. 1988) ("That the petitioners in *Dames & Moore* had an alternative forum . . . is an important distinguishing factor. In general, legislation that effects a taking will not be held unconstitutional because there is usually some forum in which an injured party can assert his claim . . . . ") (citing Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987)).

226. 680 F. Supp. 99 (S.D.N.Y. 1988).

227. *Id.* at 106.

4. Compensation

According to the Supreme Court, "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.' "[228] When the government effects a taking through physical occupation, regulation, or impairment of a property interest, and there is a means of obtaining compensation, the governmental action will "generally, . . . not be found unconstitutional."[229] When, however, "legislation leaves [claimants] without access to any tribunal where they can be assured of the enforcement of their . . . rights, the legislation must fail."[230] This is true with respect to international legislation, such as a treaty,[231] as well as domestic legislation.

The above analysis may raise some doubts regarding the constitutionality of the Vienna Convention and the Diplomatic Relations Act. Neither provides a victim of diplomatic immunity abuse with a means of redress for the taking of a compensable property interest. This would appear to be a violation of the Fifth Amendment. Despite the logic of this argument, this Note does not suggest an abrogation or even an amendment of either piece of legislation. As discussed in Part I, such action would be highly detrimental to both American and global policies.[232] Furthermore, neither abrogation nor legislative amendment would release the United States from its international obligations.[233] Instead, this Note proposes leaving the current laws of diplomatic immunity intact while providing "meaningful compensation" for victims of

228. Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) (quoting Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 659 (1890)); *see also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 94 n.39 (1978).

229. *In re* Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1311 (9th Cir. 1982) (citing *Duke Power*, 438 U.S. at 94 n.39).

230. *Morgan Guaranty Trust*, 680 F. Supp. at 106.

231. "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation." Whitney v. Robertson, 124 U.S. 190, 194 (1888); *see also* Chae Chan Ping v. U.S. (The Chinese Exclusion Case), 130 U.S. 581 (1889). Therefore, international agreements are subject to the same constitutional constraints as statutes. "That the treaty power of the United States extends to all proper subjects of negotiations between our government and the governments of other nations, is clear. . . . It would not be contended [,however,] that it extends so far as to authorize what the Constitution forbids . . . ." Geofroy v. Riggs, 133 U.S. 258, 266-67 (1890); *see also* Missouri v. Holland, 252 U.S. 416, 419 (1920) ("Every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids.") (citation omitted); Finzer v. Barry, 798 F.2d 1450, 1483 (D.C. Cir. 1986) (Wald, C.J., dissenting) (quoting Restatement of Foreign Relations Law § 131 comment a (Tent. Final Draft, July 15, 1985)) ("[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them."); L. HENKIN, *supra* note 142, at 251-54.

232. *See supra* note 137 and accompanying text.

233. *See supra* note 80 and accompanying text.

diplomatic immunity abuse in accordance with the Just Compensation Clause.[234]

The Fifth and Fourteenth Amendments require that just compensation be paid to a person whose "property" interest has been "taken" by the government. Just compensation is "equivalent [to] the full value of the property contemporaneously with the taking."[235] The courts, however, have adopted a number of methods to determine the full value of the property taken and, thus, the compensation due.[236]

Writing for the Supreme Court, Justice Holmes, in *Boston Chamber of Commerce v. Boston*,[237] applied the "market value test" to determine the compensation due: a court should ask, "What has the owner lost . . . not [w]hat has the taker gained."[238] While this is the "most basic principle for determining the amount due an individual whose property has been taken, . . . [it] is not, however, a definitive test."[239] Sixty-three years after *Boston Chamber of Commerce*, in *United States v. Fuller*, the Supreme Court held that "equitable principles of fairness" should govern the determination of compensation.[240]

In cases involving diplomatic theft, property damage, and breach of contract, valuation of the property "taken" is relatively simple under either method of compensation. When, however, the property interest is an unadjudicated cause of action, the question of compensation becomes substantially more problematic. As the proposal in Part V indicates, however, the difficulties in valuing these property interests can be alleviated by providing a means to adjudicate such claims, creating procedural safeguards, and setting limits on recovery.[241]

IV. Responses to Diplomatic Immunity Abuse

The inequities created under the doctrine of diplomatic immunity have been the source of great consternation in the United States. Perhaps without even recognizing the constitutional mandate for this change, scholars, legislators, and the American people have issued proposals to render diplomats more accountable for their actions and to compensate victims of diplomatic immunity abuse for their injuries.

234. The details of this proposal are discussed in Part V. *See infra* notes 264-280 and accompanying text.

235. Russian Fleet v. United States, 282 U.S. 481, 489 (1931) (citing Phelps v. United States, 274 U.S. 341, 343 (1927); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123 (1924)).

236. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 148, at 416.

237. 217 U.S. 189 (1910).

238. *Id.* at 195.

239. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 148, at 417.

240. United States v. Fuller, 409 U.S. 488 (1973); *see* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 148, at 147.

241. *See infra* notes 267-280 and accompanying text.

This section of the Note briefly discusses efforts by Congress and the American people to address the continuing problems arising under the doctrine of diplomatic immunity, and then focuses on the advantages and disadvantages of proposals made by legal scholars. Following that discussion, Part V proposes a solution to some of the problems of diplomatic immunity abuse.[242]

Since the Vienna Convention, the most significant contribution by Congress to addressing the inadequacies of diplomatic law has been the Diplomatic Relations Act of 1978.[243] As discussed above, this Act, though highly commendable in its undertaking, has fallen short of its intended mark.[244] Although other congressional legislation has proven generally less ambitious and successful than the Diplomatic Relations Act,[245] two bills introduced during the congressional hearings that culminated in the passage of the Diplomatic Relations Act deserve special attention. Neither bill was adopted in the final draft of the Diplomatic Relations Act, but their "intent merits renewed consideration."[246] The first, a proposal for a claims fund to compensate victims of diplomatic tortfeasors,[247] is discussed below. The second, a right of action in the Court of Claims,[248] is discussed in Part V.[249]

The American public has also endorsed legislation aimed at redressing diplomatic immunity abuse.[250] In this crusade, the American people have employed both the "power of the press" and the less commendable "power of the fist"[251] to effect change. According to two commentators, "[c]oncerted media attention can bring results, shaming the diplomatic community into action to try and improve its tarnished im-

242. *See infra* notes 267-280 and accompanying text.

243. *See supra* notes 92-95 and accompanying text.

244. *See supra* note 96 and accompanying text.

245. The following are some of the bills introduced in Congress:

(1) "Providing that the United States shall be deemed liable in the case of any judgment levied by any court against any diplomat against whom recovery of damages is statutorily not allowed." S. 477, 95th Cong., 1st Sess. (1977); H.R. 1535, 95th Cong., 1st Sess. (1977).

(2) "To establish within the Department of State an Assistant Secretary for Claims Against Foreign Ministers and Diplomats; to award just compensation for such claims; and for other purposes." S. 478, 95th Cong., 1st Sess. (1977).

(3) "To protect the internal security of the United States against international terrorism by making the use of a firearm to commit a felony by foreign diplomats in the United States a Federal felony." S. 339, 100th Cong., 1st Sess. (1987).

246. Note, *supra* note 75, at 137.

247. "To establish within the Department of State a Bureau of Claims Against Foreign Diplomats with responsibility for awarding full and just compensation to persons injured by foreign diplomats . . . ." H.R. 7309, 95th Cong., 1st Sess. (1977).

248. "To allow a person having a claim for damages against an individual entitled to diplomatic immunity to bring an action in the Court of Claims for recovery of such damages from the United States." H.R. 8364, 95th Cong., 1st Sess. (1977).

249. *See infra* notes 267-280 and accompanying text.

250. *Bill Aims at Diplomatic Crime*, N.Y. Times, April 14, 1988, § 1, at 8, col. 4.

251. Note, *supra* note 89, at 357.

age."[252] Nevertheless, the actual success of these media campaigns is not clear.

In recent years, the most comprehensive proposals have come from legal scholars. Some solutions asserted by these scholars include (1) an amendment to the Vienna Convention;[253] (2) a more stringent enforcement of the Diplomatic Relations Act;[254] (3) compulsory embassy insurance;[255] and (4) creation of a claims fund to compensate American victims.[256] While space precludes a detailed discussion of these proposals, a brief commentary will show the drawbacks of each.

First, enacting any amendment to the Vienna Convention would entail exhaustive international cooperation. Gathering the nations of the world and convincing them to agree to a uniform system of diplomatic law would be a miraculous feat.[257] Furthermore, nonsignatories would still be subject to a different standard of diplomatic immunity under customary international law.[258]

Second, a more stringent application of the Diplomatic Relations Act, while logically based, would also be impractical. According to the commentator who proposes this course of action, "voluntary compliance by the diplomats, coupled with increased responsibility by the sending state for the acts of their diplomats, would greatly reduce the problems created by diplomatic privileges and immunities."[259] While this is true, such voluntary compliance would also require a degree of cooperation which has so far proved impossible to attain.

Regarding the third proposal, the commentator who suggests a scheme for private insurance for foreign embassies in the United States asserts that "[a]ny proposed solution . . . should not curtail existing immunities in order to continue protection for American diplomats abroad and should also be unique to the United States in order to avoid the need to engage hundreds of countries in fruitless negotiations."[260] She is correct in her assertion. Yet, the compulsory insurance scheme she proposes would inevitably both endanger the lives of American diplomats and lead to international insurance wars; these consequences would be far more detrimental than "fruitless negotiations." This scheme would also require compelling reluctant insurance companies to bear the costs

252. C. ASHMAN & P. TRESCOTT, *supra* note 32, at 345.

253. Note, *supra* note 73.

254. *See* Note, *supra* note 89.

255. Note, *supra* note 30, at 1517.

256. Note, *supra* note 75.

257. "[T]he logistics involved in renegotiating or amending the Vienna Convention would very likely prove to be insurmountable. Any endeavor involving 113 countries is bound to be so complex that it, combined with the present lack of international cooperation, will ultimately prevent such a solution." Note, *supra* note 30, at 1536-37 (citation omitted).

258. *See supra* note 80 and accompanying text.

259. Note, *supra* note 89, at 355.

260. Note, *supra* note 30, at 1537-38.

of the American Government's policy of extending diplomatic immunity.[261]

Finally, although the proposal for a claims fund to "compensate injured private citizens who could not otherwise bring a successful action under the [Diplomatic Relations Act]"[262] is commendable, it also has drawbacks. While criticism of this proposal has centered on its tremendous cost,[263] the more serious problems would arise in the implementation of the fund.[264] "Aside from the fact that the State Department 'expressed displeasure' with the idea, the actual mechanics of funding and administering such a program would be difficult."[265] The "expressed displeasure" of the State Department should not, however, be underestimated as a serious obstacle to the program's implementation.[266]

V. A Solution to the Problem of Diplomatic Immunity Abuse

A. A Cause of Action Against the United States in the Court of Claims

In 1978, a bill was introduced in Congress which would have "allow[ed] a person having a claim for damages against an individual entitled to diplomatic immunity to bring an action in the Court of Claims for recovery of such damages from the United States."[267] Although this bill was never enacted, it nonetheless provides an excellent solution to the problem of diplomatic immunity abuse.

B. Advantages of the Proposal

Bringing a cause of action against the United States Government in the Court of Claims has several advantages. First, because denial of a cause of action under the doctrine of diplomatic immunity constitutes a compensable taking under the Fifth and Fourteenth Amendments,[268] the

261. *Id.* at 1539.

262. Note, *supra* note 75, at 149.

263. "Have you given any thought to the total cost that such an office might entail? Every time we do something, it seems to get up in the millions, sometimes in the trillions." *Id.* (quoting *Diplomatic Immunity: Hearings Before the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 5 (1978) (statement of Sen. Metzenbaum)).

264. The expense of compensating victims of diplomatic immunity abuse should be included in the governmental costs of the policy. *See supra* Part III, notes 142-241 and accompanying text.

265. Note, *supra* note 30, at 1531 (quoting Evan Dobelle, Chief of Protocol of the United States).

266. The "expressed displeasure" of the State Department has been attributed primarily to the Department's apprehension of creating a "judicial or quasi-judicial apparatus" within the department. *See Diplomatic Privileges and Immunities: Hearings and Markup Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 219 (1977).

267. H.R. 8364, 95th Cong., 1st Sess. (1977).

268. *See supra* Part III, notes 142-241 and accompanying text.

Court of Claims is the proper place to bring such an action.[269] "Congress has given the Court of Claims jurisdiction of all claims for just compensation under the Fifth Amendment, and has been automatically appropriating funds to pay that court's judgments."[270] The Court of Claims is both highly experienced in dealing with claims of this nature and sufficiently funded to accommodate their proper adjudication.

Second, this proposal imposes the costs of the policy of diplomatic immunity on the proper entity: the United States Government. It neither forces a few individuals to pay the costs of a national policy, nor does it, as in the compulsory insurance proposal,[271] require insurance companies to carry the burden. Instead, the burdens of the United States' policy of diplomatic immunity are "borne on the public as a whole."[272] As a consequence, this proposal reconciles the present practice of diplomatic immunity with the Fifth and Fourteenth Amendments. Not only does it avoid the possibility of future attacks for unconstitutional taking, it also places the burden of this policy where, in all "fairness and justice,"[273] it should be.

Third, the proposal provides an impetus and a means to punish diplomatic immunity abusers. With the possibility of numerous claims being brought against it, the United States Government may be more inclined to declare a diplomat *persona non grata* or even to invoke the expulsion power[274] for grievous offenses besides espionage. Monitoring claims advanced in the Claims Court could keep the government apprised of diplomatic immunity abuses. For those who habitually violate the laws of the United States or commit serious crimes, the records of the Claims Court could serve as grounds for revoking diplomatic status. Yet, the exercise of the *persona non grata* and expulsion powers should continue to be conducted with extreme caution. Even with adequate evidence of culpability, such actions may invite retaliation and impair the conduct of foreign affairs.

Fourth, "[t]he provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments."[275] Because its enactment is not contingent

269. Exclusive jurisdiction for monetary relief against the United States in excess of $10,000 lies in the Court of Claims under the Tucker Act. 28 U.S.C. §§ 1346, 1491(a) (1982). For those claims valued at less than $10,000, the Tucker Act grants concurrent jurisdiction to the District Courts of the United States and the Court of Claims when the claim is founded upon the Constitution, or any law of Congress, or any contract, express or implied with the United States. 28 U.S.C. § 1346(a)(2) (1982).

270. L. HENKIN, *supra* note 142, at 264-65.

271. *See supra* notes 260-261 and accompanying text.

272. Armstrong v. United States, 364 U.S. 40, 49 (1960).

273. *Id.*

274. *See supra* notes 122-127 and accompanying text.

275. Russian Fleet v. United States, 282 U.S. 479, 492 (1931).

upon the establishment of similar remedies by other nations, and because it affects only domestic affairs, the proposal enjoys the benefit of "being unique to the United States."[276] No diplomats are held subject to the jurisdiction of American courts. No "fruitless negotiations" are required.[277]

Fifth, bringing a cause of action in the Claims Court avoids incurring the "displeasure" of the State Department. Unlike the claims fund, this proposal employs a pre-existing judicial arena having no affiliation with the State Department.[278] In addition, the claim is brought against the United States Government, not a foreign dignitary. Consequently, the State Department cannot complain of foreign policy concerns that would prevent the adjudication of such claims. It therefore avoids any of the problems of justiciability that are continually encountered in current efforts to bring direct actions against diplomats.[279]

Finally, the proposal enjoys the advantage of leaving current diplomatic law intact. Under the proposal, diplomats, staff members, and their families would continue to enjoy the immunities granted under the Vienna Convention.[280] As demonstrated by the Diplomatic Relations Act, most unilateral efforts to alter diplomatic immunity are ineffectual in dealing with abuses. As discussed in Part IV, any effort to amend the Vienna Convention will almost certainly fail. Although diplomats may continue to abuse their special status, this proposal renders their wrongs less harmful by spreading the burdens of abuse and, at the same time, avoids upsetting the status quo.

VI. Conclusion

The doctrine of diplomatic immunity has existed since the beginning of recorded history. Although the rationale for extending diplomatic immunity may have been somewhat different several thousand years ago, governments of those times, as today, recognized its necessity in developing and maintaining international relations. Individuals living at that time also experienced its unfortunate ramifications: diplomatic immunity abuses.

In recent years, scholars, legislators, and members of the American public have addressed diplomatic immunity abuse. The primary focus throughout has been on the causes of abuse: the overextension of immunity by receiving states, the absence of cooperation by sending states, the lack of deterrence under diplomatic legislation, and the fear of retalia-

276. *See supra* note 260 and accompanying text.

277. *Id.*

278. *See supra* notes 262-266 and accompanying text.

279. *See supra* notes 104-112 and accompanying text.

280. *See supra* notes 83-86 and accompanying text.

tion.[281] Perhaps the time has come to focus on the results of abuse: individuals harmed by diplomats are being denied the right to bring a cause of action for the sake of promoting international relations. More precisely, people are forced to bear a taking of property without just compensation.

"The Fifth [and Fourteenth] Amendment[s'] guarantee that private property shall not be taken for a public purpose without just compensation was designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice should be born[e] by the public as a whole."[282] The doctrine of diplomatic immunity cannot be eliminated, but its costs as well as its benefits must be borne by the American public as a whole. Both the traditional sense of personal justice[283] and the Fifth and Fourteenth Amendments of the United States Constitution require this result. The infringement of constitutional rights for the sake of international diplomacy can no longer be ignored.

The provision for a cause of action in the United States Court of Claims would not interfere with American foreign relations. It would, however, enable an American citizen to obtain just compensation for property taken to advance American foreign policy, undoubtedly a "public purpose." As the Supreme Court has indicated, under this proposal,

> the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation. . . . It seems to us that this "bargain" . . . by which the present peace and quiet of the United States, as well as [its] future prosperity and greatness [are] largely secured, and which [is] brought about by the sacrifice of the interests of individual citizens falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.[284]

We must reconcile ourselves to the fact that the doctrine of diplomatic immunity is indispensable. This does not mean, however, that the unfortunate ramifications of this doctrine must continue to be tolerated.

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281. *See supra* Part II, notes 113-141 and accompanying text.
282. Armstrong v. United States, 364 U.S. 40, 49 (1960).
283. *See supra* notes 1-5 and accompanying text.
284. Gray, Adm'r v. United States, 21 Ct. Cl. 340, 392-93 (1886).

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